



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/833,314	04/10/2001	Christophe Dupont	3714652.00239	4353
29157	7590	05/05/2010		
K&L Gates LLP P.O. Box 1135 CHICAGO, IL 60690			EXAMINER WEINSTEIN, STEVEN L	
			ART UNIT 1782	PAPER NUMBER
			NOTIFICATION DATE 05/05/2010	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

1 RECORD OF ORAL HEARING
2 UNITED STATES PATENT AND TRADEMARK OFFICE
3
4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES

6
7 *Ex parte* CHRISTOPHE DUPONT
8 MARC DAMBRINE, LAURENT SISIAC,
9 THIERRY BAHAX, STEPHEN MAY and
10 STEVEN E. DINGMAN

11
12
13 Appeal 2009-010871
14 Application 09/833,314
15 Technology Center 1700

16
17 Oral Hearing Held: April 15, 2010
18

19
20 Before BRADLEY R. GARRIS, CHUNG K. PAK and
21 MARK NAGUMO, *Administrative Patent Judges*

22
23 ON BEHALF OF THE APPELLANT:

24 MICHAEL A. BECKETT, ESQ.
25 K&L Gates, LLP
26 70 West Madison Street
27 Suite 3100
28 Chicago, IL 60602-4207
29

1 JUDGE GARRIS: Good morning, Mr. Beckett.

2 MR. BECKETT: Hi.

3 JUDGE GARRIS: Sir, as you know, you have about 20
4 minutes to present your case. Please begin.

5 MR. BECKETT: Good morning. I am here on behalf of the
6 Appellants for U.S. Serial No. 09/833,314. Date of issue on
7 this -- obviousness rejection, which I hope you agree is improper, as a matter
8 of fact and law.

9 I primarily want to focus on some essential aspects of the
10 claimed invention, and then just discuss a couple of the primary references,
11 in view of the large plurality of the references, that were cited by the
12 Examiner.

13 At this time, I'd like to discuss the invention in detail to clarify
14 the scope of the claimed invention. Independent Claims 1 through 2, 6, and
15 9 recite in part a canned pet food product.

16 This means that the claimed invention includes the following
17 elements: A pet food product and a can containing the pet food product.

18 As understood by the skilled artisan, pet food products are
19 distinguishable from other food products, such as food products for human
20 consumption.

21 JUDGE NAGUMO: Where is the evidence for that in the
22 record?

23 MR. BECKETT: It's just something that the skilled artisan
24 would know. I mean, when you characterize a food product as a pet food
25 product, it inherently has some qualities related --

26 JUDGE NAGUMO: I would feed my cat canned tuna, the same
27 tuna that I would eat myself for dinner. I don't see -- I mean, I saw that
28 argument in the Briefs, but I'm not quite sure why I should accept that as --

29 MR. BECKETT: Well, it's a --

30 JUDGE NAGUMO: And what impact that would have.

31 I mean, if we look at Vickers, Vickers describe a meat roll that
32 has the same general shape, a cylinder -- a core.

1 MR. BECKETT: Mm-hmm.

2 JUDGE NAGUMO: And they have different textures. And so
3 the step from there to the same product, it seems to me, is you put a can
4 around it.

5 You can that meat roll.

6 MR. BECKETT: Mm-hmm.

7 JUDGE NAGUMO: There's lots of evidence in the record that
8 indicates that canning various foods, including pet foods, in different
9 configurations is well known.

10 MR. BECKETT: Mm-hmm.

11 JUDGE NAGUMO: So while I think we can all agree that the
12 Examiner may have gone a little overboard, I don't think we can fault him
13 for not presenting evidence that the distribution of food in a can is an
14 obvious matter of design choice.

15 MR. BECKETT: Mm-hmm.

16 JUDGE NAGUMO: It seems to me that the Examiner has put
17 up a pretty good case for that. Why is that -- ?

18 MR. BECKETT: Well, first of all, pet food products are
19 formulated to readily be digestible, very palatable to animals, and contain
20 necessary nutrients, trace elements for animals.

21 The question is, would you feed a pet food product to a human?
22 And I think most people would say no.

23 JUDGE NAGUMO: I think a lot of people disagree. And I
24 think there are a lot of people who -- I mean, as a child I used to eat kibble --

25 MR. BECKETT: Well, we're dealing with I guess the skilled
26 artisan and the pet food manufacturing process as well, too.

27 I mean, you --

28 JUDGE GARRIS: Let's not go -- please answer Judge
29 Nagumo's question.

30 MR. BECKETT: Mm-hmm.

31 JUDGE GARRIS: Do you have evidence -- in the appeal
32 before us that an artisan would have distinguished between a canned food

1 product that is meant to be fed to a pet versus a canned food product meant
2 to be fed to a human?

3 MR. BECKETT: No explicit evidence, other than the term
4 itself.

5 JUDGE GARRIS: Then let's go on, then, to the remainder of
6 your argument.

7 MR. BECKETT: Okay.

8 And this is just to build on my previous discussion.

9 Example 1 of the pending application discloses that the outer
10 can, outer face comprises a -- mixture prepared from 53 percent of poultry
11 carcasses, pig lungs, and beef liver. The interface can be prepared from a
12 ground meat mixture of about 73 percent of poultry carcasses, pig's lung,
13 and beef liver, and about 2 percent of powdered beef plasma, among other
14 things, which are, again, directed toward animal products.

15 The skill artisan understands that describing a pet food product
16 inherently gives the food product attributes that distinguish it from a human
17 product, which are generally not designer-suitable for consumption by
18 animals.

19 Practically speaking, the -- skilled artisan would not serve pet
20 food products to humans, and vice versa. Independent Claims 1 through 2, 6
21 and 9 further recite that the canned pet food product comprises an outer
22 tubular phase, which extends from the lower end to the upper end, and a
23 substantially cylindrical inner phase, which extends from the lower end to
24 the upper end.

25 The canned pet food product has the advantage of having an
26 attractive appearance.

27 JUDGE GARRIS: Let's not talk about attractive appearance.
28 Let's just deal with the issue. What in this claim, in your mind, distinguishes
29 over the prior art? Focus on Claim 1.

30 MR. BECKETT: That's what I said. The phases --

1 JUDGE GARRIS: You know there are cans in the prior art.
2 And we know there are food products. I know you tried to distinguish
3 between pet versus human food.

4 MR. BECKETT: Mm-hmm.

5 JUDGE GARRIS: But aside from all that.

6 MR. BECKETT: Okay.

7 JUDGE GARRIS: Please tell us what in this claim would you
8 first point out as distinguishing over the prior art --

9 MR. BECKETT: Well, focusing primarily on May, Vickers,
10 and Ohba, May --

11 JUDGE GARRIS: I think Ohba is the primary reference the
12 Examiner might be looking at --

13 MR. BECKETT: Ohba relates to a vertically and horizontally
14 packed foods containing two or more pet food products. Ohba does not -- an
15 inner face comprising an emulsion product and gravy, and Ohba's product is
16 produced using a completely different process.

17 For example, Ohba teaches using edible sheets to separate
18 solidified food layers that are arranged in the desired configuration --

19 JUDGE GARRIS: And what in Claim 1 is relevant to these
20 kinds of arguments? We want to know what in Claim 1 specifically -- you're
21 looking at to define --

22 MR. BECKETT: Well, to distinguish from Ohba, Claim
23 includes -- well, all the claims include the outer tubular phase. Ohba does
24 not disclose an outer tubular phase.

25 JUDGE GARRIS: Is that known in the art? Is the arrangement
26 of an annular food product surrounding a cylindrical food product known in
27 this prior art --

28 MR. BECKETT: In other food products, not a pet food
29 product.

30 JUDGE NAGUMO: Well, what about May? May describes a
31 canned pet food that's got two different phases and the texture and
32 phases -- the -- on page 2 of the May reference, the recess in the base layer

1 can extend partially or all the way through that base layer. That's lines 26 to
2 29.

3 And the top layer, it's not clear whether it has to cover the entire
4 top, or whether it can terminate.

5 But now you've got a conical shaped central cavity.

6 MR. BECKETT: Mm-hmm.

7 JUDGE NAGUMO: With an outside tubular section.

8 MR. BECKETT: Mm-hmm.

9 JUDGE NAGUMO: I think Claim 1 says substantially
10 cylindrical inner phase.

11 MR. BECKETT: Mm-hmm.

12 JUDGE NAGUMO: Substantially is a pretty broad, loose term.

13 MR. BECKETT: Mm-hmm.

14 JUDGE NAGUMO: But even if the frustum was excluded by
15 substantially cylindrical, we've got Vickers, which shows a substantially
16 cylindrical food product.

17 MR. BECKETT: Mm-hmm.

18 JUDGE NAGUMO: Let's even for the sake of argument say
19 that pet food and people food are just completely different.

20 But still, we've got the suggestion of the geometry and the
21 texture.

22 MR. BECKETT: Mm-hmm.

23 JUDGE NAGUMO: So we've got a simpler texture and a
24 broadly similar geometry. Why is it not obvious?

25 MR. BECKETT: All right. With respect to Claim 1, that
26 probably is the weakest one with respect to Vickers. Again, with Claim 1,
27 the substantially cylindrical inner phase is really the primary argument for
28 separating Claim 1 from Vickers.

29 However, with Claims 2, 6, and 9, there is a number of
30 additional different distinguishing elements, such as the processes that are
31 forming the product in Claims 2 and 9. They're doing by completely
32 different processes.

1 Vickers puts down a meaty layer with gravy fluid layer, spins it
2 around. And after it's spinning or during its spinning, then puts a solidified
3 layer on top; whereas Claims 2 and 9 require filling the can with an outer
4 phase, outer solidified layer, forming a bore in that layer, and then pouring
5 the gravy inside.

6 JUDGE NAGUMO: But these are product by process claims.
7 The way that you make the product only makes a difference in the claim
8 product.

9 MR. BECKETT: Well, Claim 2 is. Claim 9 is an actual
10 process.

11 JUDGE NAGUMO: Can you show me, tell me where in the
12 record these separate arguments were made for the patentability of the
13 dependent claims?

14 MR. BECKETT: I think they were just generally related to in
15 that the prior art fails to disclose each and every single element of the
16 claims. And I'm just elaborating on additional weaknesses.

17 JUDGE NAGUMO: Well, this is important to us, because
18 reviewing your arguments in the Brief, I found very little other than a
19 statement of what those claims recited.

20 MR. BECKETT: Mm-hmm.

21 JUDGE NAGUMO: And so I'm concerned whether or not
22 you've really presented a separate argument for patentability for those
23 claims.

24 Particularly given the product by process status of those claims.

25 MR. BECKETT: Well, I'm also --

26 JUDGE NAGUMO: And particularly as far as Claim 9 goes,
27 can you tell me where in the Brief you've argued that as a separate --

28 MR. BECKETT: Well, that was more in addition to answer
29 your question as well. Which is --

30 JUDGE GARRIS: You understand, of course, that oral
31 arguments have to be based on your brief.

32 MR. BECKETT: Mm-hmm.

1 JUDGE GARRIS: You can't come in here and present for the
2 first time an argument at oral hearing that you have never previously
3 presented to the Examiner in the Brief.

4 MR. BECKETT: Mm-hmm.

5 JUDGE GARRIS: Otherwise, the Examiner never has an
6 opportunity to even know that you've presented the argument, much less an
7 opportunity to respond to it.

8 MR. BECKETT: Yeah. Yeah. And I again just was
9 addressing some specific answers to his questions.

10 JUDGE GARRIS: Well, then maybe you could focus, then on,
11 again, what is thought to distinguish, for example, Claim 1, or for that
12 matter -- product of Claim 2 I guess, from the prior art that Judge Nagumo
13 has been discussing.

14 We need to know what specific limitations are in your claims
15 that you considered to patentably distinguish over this prior art?

16 MR. BECKETT: Yeah. Well, in addition, the substantially
17 cylindrical face having the formulated emulsion product in the gravy is
18 distinguished over Vickers as well.

19 JUDGE NAGUMO: But that's not a limitation of Claim 1.

20 MR. BECKETT: Yeah. Again, with Claim 1 it's pretty much
21 the substantially cylindrical interface, which primarily distinguished it over
22 Vickers.

23 JUDGE NAGUMO: And Claim 2 doesn't have any
24 compositional differences. It seems to recite just the making the, putting the
25 outer phase -- the can first, and then making a bore into the outer phase, and
26 then filling that hole and sealing the can.

27 MR. BECKETT: Yeah.

28 JUDGE NAGUMO: So the ultimate product is substantially
29 the same.

30 MR. BECKETT: Well, I guess that you wouldn't be able to
31 produce or form a bore in the outer layer or the base layer of May, because
32 it's made of solid food pieces and gravy, which is why they spin it around.

1 JUDGE NAGUMO: And how does the product differ?

2 MR. BECKETT: Well, because forming a bore in an outer
3 phase would I guess lead inherently to the fact that it has some kind of
4 solidified base that would --

5 JUDGE NAGUMO: What findings of fact of record -- on this
6 could I make that would support that --

7 MR. BECKETT: Well, I might just be elaborating in more
8 detail; but I am just describing more in detail, I guess, the claimed invention
9 a little bit more thoroughly than was described maybe in the Appeal Brief or
10 the Reply Brief.

11 JUDGE GARRIS: You have little time left. Would you care to
12 perhaps summarize your basic --

13 MR. BECKETT: Okay.

14 And again, just besides distinguishing over the process claims,
15 or the product by process and Claim 6, which involves the inner phase
16 having the formulated emulsion product in gravy, I'd say the skilled artisan
17 would have no reason to combine the cited references, because they each are
18 made by different manufacturing processes suited for their specific particular
19 configuration.

20 May, Vickers, and Ohba each teach a different manufacturing
21 process to get into final claimed product. If a proposed modification
22 changes the principle of operation of the inventions, then the references are
23 not combinable.

24 And in view of the discussions that I have previously stated in
25 our Appeal Brief, we respectfully submit that the obviousness rejection is
26 improper.

27 JUDGE GARRIS: Judge Pak, any questions?

28 JUDGE PAK: No.

29 JUDGE GARRIS: Judge Nagumo, any further questions?

30 JUDGE NAGUMO: No.

31 JUDGE GARRIS: Okay. Thank you very much for --

32 MR. BECKETT: Thank you for your time.

Appeal 2009-010871
Application 09/833,314

Whereupon, at 10:03 a.m., the proceedings were concluded.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15